Supreme Court, U. S.
FILED
JUL 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-2063

W. L. McILROY AND JAMES DUNLAVEY, AS EXECUTOR OF THE ESTATE OF GRADY R. McILROY ..... *Petitioners*

VS.

STATE OF ARKANSAS, OZARK SOCIETY, AND WAYFARER EXPEDITIONS, INC. ..... *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

STEVE CLARK
Attorney General

Attorney General's Office
Justice Building
Little Rock, Arkansas 72201

Attorneys for Respondent State of Arkansas

REQ. NO. 79-23917 50 COPIES

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-2063

W. L. McIlroy and James Dunlavey, as
Executor of the Estate of
Grady R. McIlroy ..... *Petitioners*

vs.

State of Arkansas, Ozark Society, and
Wayfarer Expeditions, Inc. ..... *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

Respondent, State of Arkansas, respectfully requests that the petition for certiorari filed herein by Petitioners be denied.

QUESTION PRESENTED

Whether the question of a violation of the Fifth Amendment to the United States Constitution, which protects against the taking of property without due process of law and compensation, was properly raised and decided in the State Courts, therefore, vesting this Court with jurisdiction?

INDEX

Page

QUESTION PRESENTED 1

CONSTITUTIONAL PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 6

REASONS FOR DENYING THE WRIT 8

CONCLUSION 13

AUTHORITIES CITED

Cases:

Attorney General v. Woods, 108 Mass. 436 (1870) 11

Barboro v. Boyle, 119 Ark. 377, 178 SW 378 (1915) 11

Branch v. Oconoto County, 13 Wis. 2d 595, 109 NW2d 105 (1961) 11

Cardinale v. Louisiana, 394 U.S. 437 (1969) 8

Crowell v. Randall, 10 Pet. 368 (1836) 8

Curry v. Hill, 460 P.2d 933 (Okla. 1969) 11

Desha Bank & Trust Co. v. Quilling, 118 Ark. 114, 176 SW 132 (1915) 9

Donnelly v. United States, 228 U.S. 243 (1913) 10

Hanson v. Denckla, 357 U.S. 235 (1958) 9

Herndon v. Georgia, 295 U.S. 441 (1935) 9

Hulbert v. Chicago, 202 U.S. 275 (1906) 9

Kelley, ex rel. MacMullan v. Hallden, 51 Mich. App. 176, 214 NW2d 856 (1974) 11

Lamprey v. State, 52 Minn. 181, 53 NW 1139 (1893) 11

Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158 (1936) .. 11

Lutesville Sand & Gravel Co. v. McLaughlin, 181 Ark. 574, 26 SW2d 892 (1930) 10

People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971) 11

State, ex rel. v. Newport Concrete Co., 44 Ohio App. 2d 121, 73 Ohio Ops. 2d 124 (1975) 11

State v. Twiford, 136 N.C. 603, 48 SE 586 (1904) 11

Stroud v. Crow, 209 Ark. 820, 192 SW2d 548 (1946) 9

Williams v. Georgia, 349 U.S. 375 (1955) 9

Statutes:

28 U.S.C. §1257(3) 8

Constitutional Provisions:

United States Constitution, Amendment V 5

United States Constitution, Amendment XIV 8

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The Mulberry River, located in northwest Arkansas, originates in the Boston Mountains north of Ozark, Arkansas, and flows westerly a distance of 70 miles to a point where it joins the Arkansas River near Mulberry, Arkansas. It can best be described as an intermediate stream, smaller than the Arkansas River and other deep, wide streams that have been used commercially since their discovery, but neither is it like the many small creeks and branches in Arkansas that cannot be regularly floated with canoes or flatbottomed boats for any substantial period of time during the year. The Mulberry is somewhere in between; a typical rock-bottomed Ozark stream with relatively clear water and populated by a variety of fish. The Mulberry has been used by the public for recreational purposes for many years. It has long been used for fishing and swimming and has more recently become popular with canoeists.

In 1967, Petitioners acquired certain property through which a segment of the Mulberry River flows. Petitioners claimed that the river was nonnavigable and sought to prevent members of the public from crossing their property on the river. Respondents and members of the public claimed that the river was navigable and that they had a right to cross Petitioners' property on the river. The dispute continued for several years and culminated with Petitioners filing for a declaratory judgment on June 15, 1978, in Franklin County Chancery Court, against the Ozark Society and Wayfarer Expeditions, Inc. The Petition for Declaratory Judgment prayed that the court declare the Mulberry River to be nonnavigable at the point where it crosses Petitioners' property and that the public be enjoined from using the river through Petitioners' property. The

Ozark Society is a private non-profit conservation organization and Wayfarer Expeditions, Inc. is in the business of renting canoes. The State of Arkansas intervened on the grounds that a declaration of nonnavigability could divest the State of title to the streambed and the right of the public to the use of the waters could be foreclosed. Respondents filed answers and counterclaims alleging that the Mulberry River is navigable, and irrespective of navigability, the public had acquired a prescriptive easement over the watercourse.

The Chancery Judge held that the Mulberry River is a nonnavigable stream and that the public had not acquired a prescriptive easement. Respondents appealed to the Arkansas Supreme Court, alleging that the chancellor had erred in determining that the Mulberry River was nonnavigable and in failing to find a prescriptive easement. The Arkansas Supreme Court found that the Mulberry River can be used for recreational purposes for a substantial portion of the year, and consequently, is navigable. Petitioners filed a Petition for Writ of Certiorari seeking review of this action.

REASONS FOR DENYING THE WRIT

Petitioners have sought to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3), which provides in part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . where any title, right, privilege, or immunity is specially set-up or claimed under the Constitution . . .

This invocation of jurisdiction is based upon the premise that the decision of the Arkansas Supreme Court has effected the taking of Petitioners' property without compensation, contrary to the Fourteenth Amendment to the United States Constitution. This amendment guarantees the right to equal protection and due process of law. Petitioners do not specifically explain what rights under the Fourteenth Amendment have been violated, however, due to the nature of the claim of taking without compensation, one may logically infer that Petitioners are seeking to apply the Fifth Amendment to the State through the Fourteenth Amendment. For purposes of this argument, it will be presumed that this is the federal question raised by Petitioners.

It has long been established that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the State court below. *Crowell v. Randall,* 10 Pet. 368 (1836); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). Petitioners did not plead or raise the issue of taking without compensation at the trial level. A question not put in issue by the pleadings, and not passed on by the

trial court, will not be determined on appeal. *Desha Bank & Trust Co. v. Quilling,* 118 Ark. 114, 176 SW 132 (1915); *Stroud v. Crow,* 209 Ark. 820, 192 SW2d 548 (1946). Petitioners did not properly place the federal question before the State courts, nor was it decided by the State courts, and thus this Court is not vested with jurisdiction. A state procedural rule which forbids the raising of federal questions at a late stage in the case, or by any other prescribed method has been recognized as a valid exercise of state power. *Williams v. Georgia,* 349 U.S. 375 (1955); *Hulbert v. Chicago,* 202 U.S. 275 (1906). These decisions preclude additional federal questions in regard to state procedure.

The one exception to this line of decisions is that in the extraordinary circumstance of an unexpected decision, a petition for rehearing may constitute the first time to present a federal question to the court. For Supreme Court jurisdiction to attach in this situation, the litigant must affirmatively demonstrate that the decision was a surprise and could not be anticipated. *Herndon v. Georgia,* 295 U.S. 441 (1935). In the absence of surprise, raising the federal question for the first time in a petition for rehearing is generally insufficient unless the court actually entertains and expressly decides the question. *Hanson v. Denckla,* 357 U.S. 235 (1958). Petitioners raised the federal question for the first time for the record in a petition for rehearing, which was summarily denied by the Arkansas Supreme Court, and therefore, the question was neither entertained nor expressly decided. Thus Petitioners have the burden of showing surprise and that the decision was unanticipated. In an attempt to meet this burden, Petitioners have blatantly misrepresented the record and local law.

At page six of Petitioners' petition filed with this

Court, in the second paragraph as part of the statement of the case, Petitioners state:

> "All parties conceded in the chancery court and in the Arkansas Supreme Court that the test under Arkansas law has always been whether the stream is capable for use commercially . . ."

The record is absolutely devoid of any such stipulation by parties, and in fact Respondents raised recreational use as establishing navigability at both the trial and appellate level. Petitioners have been aware of this argument since the trial level and cannot claim the issue was a surprise.

Petitioners have also attempted to characterize the decision as novel and discordant with prior Arkansas law, and thus unanticipated. Such is not the case. Upon admission to the Union, the State took title to the bed of navigable streams, and the determination of title and rights in navigable streams is a matter of local law. *Donnelly v. United States,* 228 U.S. 243 (1913). Under Arkansas law, the riparian owner holds title to the bed of a nonnavigable stream, while the State holds title to the bed of navigable streams for the use and benefit of the public. *Lutesville Sand & Gravel Co. v. McLaughlin,* 181 Ark. 574, 26 SW2d 892 (1930). The instant case is similar to a title dispute in that the declaration of navigability or nonnavigability would determine title to the streambed.

The Arkansas Supreme Court has held that the running of a meander line along the bank of a stream does not establish navigability, although a body of water which has been meandered is prima facie navigable, but it is not necessarily or conclusively so. *Lutesville Sand & Gravel Co. v. McLaughlin, supra.* The record reflects that the Mulberry

River was meandered where it crosses Petitioners' property, which creates the rebuttable presumption that it is navigable. The final judicial determination, however, must be based on a finding of navigability in fact as navigability is defined in Arkansas law.

Petitioners have relied on the case of *Barboro v. Boyle*, 119 Ark. 377, 178 SW 378 (1915), as defining navigability in terms of usefulness of the body of water for carrying commerce. Petitioners failed to cite all of the relevant provisions of this case. The Arkansas Supreme Court went on to expand the definition of navigability to include other public uses, including recreational boating, swimming, and fishing. The court in the instant case merely applied the existing definition of navigability to the Mulberry River. The establishment of navigability through recreational use is not unique, and a number of jurisdictions have reached similar decisions. *Attorney General v. Woods,* 108 Mass. 436 (1870); *State, ex rel. v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 73 Ohio Ops. 2d 124 (1975); *Kelley, ex rel. MacMullan v. Hallden*, 51 Mich. App. 176, 214 NW2d 856 (1974); *People v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *Lamprey v. State*, 52 Minn. 181, 53 NW 1139 (1893); *Luscher v. Reynolds*, 153 Ore. 625, 56 P.2d 1158 (1936); *Branch v. Oconoto County*, 13 Wis. 2d 595, 109 NW 2d 105 (1961); *Curry v. Hill*, 460 P.2d 933 (Okla. 1969); *State v. Twiford*, 136 N.C. 603, 48 SE 586 (1904).

The record reflects that Petitioners acquired title to the property in question in 1967, which was subsequent to the decisions in *Lutesville Sand & Gravel Co. v. McLaughlin, supra* and *Barboro v. Boyle*, supra. The property was acquired under a rebuttable presumption that the Mulberry River was navigable, and it is indeed navigable under

Arkansas law existing at the time of acquisition. Petitioners cannot claim that the decision was unanticipated or that the law was changed subsequent to their acquisition of the property. Under Arkansas law, Petitioners did not acquire title to the streambed with acquisition of the riparian land, and consequently, nothing was taken. There exists no federal question in the instant case.

Petitioners have failed to demonstrate the required elements to obtain jurisdiction by this Court. The federal question was not properly placed before the State court under state procedure, nor was decided by the State court. The State court decision was not a surprise and could reasonably be anticipated, and therefore no extraordinary circumstances exist. Most importantly, no federal question exists. In the absence of a proper federal question, this Court is without jurisdiction. Petitioners have sought to create the illusion of a federal question in hopes of inducing this Court to review local law, and perhaps interpret it in favor of Petitioners.

CONCLUSION

For all of the foregoing reasons and authorities, the State of Arkansas respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

STEVE CLARK
Attorney General

Attorney General's Office
Justice Building
Little Rock, Arkansas 72201

Attorneys for Respondent
State of Arkansas